Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1680

ERNEST A. FATHEREE,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit

EDWARD G. MAAG
4343 West Main Street
Belleville, Illinois 62223
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

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vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit

ERNEST A. FATHEREE, petitioner, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on April 2, 1976.

OPINION BELOW

The opinion of the United States Court of Appeals is not yet reported, but is set forth in full as Appendix "A" to this petition on pages A-1 through A-6. The opinion of the Court

of Appeals affirmed the conviction of Ernest A. Fatheree; for an alleged violation of 18 U.S.C. 876. The petitioner had been tried by jury trial in the United States District Court for the Eastern District of Illinois, the Honorable Henry Wise, Judge presiding, and was found guilty. The Court denied defendant's post-trial motions, imposed sentence upon the defendant and entered judgment of conviction against the defendant.

JURISDICTION

The judgment of the United States Court of Appeals was entered on April 2, 1976. A petition for Rehearing was filed on April 16, 1976, and denied by the United States Court of Appeals on April 20, 1976 (Appendix "B"). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Did the Court below err in affirming the District Court's judgment of conviction of petitioner by holding that there was sufficient evidence regarding proof of mailing or causing a mailing within the meaning of Title 18, U.S.C., Section 876.

Did the Court below err in affirming the District Court's judgment of conviction despite the inflammatory and prejudicial comments of the prosecutor in closing argument.

STATUTE INVOLVED

The statute involved is Title 18, United States Code, Section 876 which states as follows:

§ 876. Mailing threatening communications

Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered

by the Post Office Department or knowingly causes to be delivered by the Post Office Department according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnaped person, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined not more than $500 or imprisoned not more than two years, or both. June 25, 1948, c. 645, 62 Stat. 741.

STATEMENT OF CASE

This action arose by the return of an indictment by the Grand Jury for the United States District Court for the Eastern District of Illinois which contained three counts charging Ernest A. Fatheree with violations of Title 18 U.S.C. Section 876, in that he knowingly, and with intent to extort a sum of money, did deposit in an authorized depository for mail matter a written communication containing a threat to injure certain specified persons.

The case was tried before a jury, the Honorable Henry Wise, presiding Judge, and the defendant was found guilty. The trial court denied all of defendant's post-trial motions and imposed a term of imprisonment on petitioner, Ernest A. Fatheree.

The petitioner, Ernest A. Fatheree, raised two issues on appeal to the United States Court of Appeals for the Seventh Circuit;

I. The Court erred in denying defendant's motion for acquittal of the evidence.

II. The Court erred in denying defendant's motion for mis-trial based upon the improper, prejudicial and inflammatory closing argument of government's counsel.

The petitioner on this appeal prays Certiorari on these issues.

Mrs. A. W. Pickel, Jr. received four extortionate letters through the United States Mail (Government's Exhibits 1 through 4-A), postmarked respectively on December 8, 1973, January 15, 1974, January 30, 1974, and January 2, 1974.

An F.B.I. handwriting examiner, Fred Woodcock, testified

that it was "my conclusion that defendant wrote the four envelopes." (T. 209). Witness Woodcock further testified that it was his conclusion that "the defendant wrote the letter that has been designated Government's Exhibit 1-A." (The first of the four letters written.) (T. 209).

The evidence was contradictory as to whether or not the defendant and the victim and her late husband were good friends or not, evidence being introduced by way of testimony that they had participated in social events together, as well as some evidence that there were certain areas of friction between the Fatherees and the Pickels. (See testimony of Mrs. A. W. Pickel, Jr.)

On cross-examination, the witness Woodcock testifies that he observed many differences in appearance between the various handwriting specimens, and the extortion letters, but he did not feel these were relevant to his opinion as to the identity of the writer.

The only direct evidence linking defendant to the alleged crime was the testimony of the Government expert witness, handwriting analyst, Woodcock, as stated above.

The opinion of the United States Court of Appeals for the Seventh Circuit affirm the convictions of the petitioner and held that there was sufficient evidence of mailing. The Court further held in its opening that the words of the prosecutor in closing argument did not have any erroneous impact on the jury's determination.

In so holding, the Court of Appeals for the Seventh Circuit misconstrued the law with regard to proof of mailing and causing a mailing as required by 18 U.S.C. 876, and underestimated the inflammatory and prejudicial effect of the comments of the prosecutor in closing argument.

REASONS FOR GRANTING THE WRIT

The petitioner, Ernest A. Fatheree, respectfully and sincerely urges that there exists in this cause, manifest, overwhelming, and compelling reasons for the granting of a Writ of Certiorari in this cause. These reasons are as follows:

1. This Court has never clearly delineated the extent to which circumstantial evidence may be used to support a conviction under 18 U.S.C. Section 876.

2. No Court has ever reached a conclusion similar to that arrived at by the United States Court of Appeals for the Seventh Circuit in this opinion below.

3. The comments made in closing argument by the prosecutor at the trial below, were so prejudicial and inflammatory as to be manifestly unjust and to have deprived the petitioner of a trial by an impartial jury of his peers.

I

This Court Has Never Clearly Delineated the Extent to Which Circumstantial Evidence May Be Used to Support a Conviction Under 18 U.S.C. Section 876.

In it's opinion the Court of Appeals cited the frequently noted case of *Petschel v. United States*, 369 F 2d 769 (8th Cir. 1966). Although it is true that the 8th Cir. in Pretschel supra, did hold that proof of mailing and causing a mailing may be made by circumstantial evidence, it further stated "each case must be judged upon it's own facts." (page 772).

It is evident that the facts peculiar to Petschel supra, presented a much stronger case to the 8th Cir. than the facts in the instant case before this Court. In Petschel supra, the defendant

admitted that he wrote the letters, admitted that he placed them in an envelope and addressed it, and admitted that he gave it to another person for the purpose of being placed in the mail.

In the instant case, petitioner had denied writing the letters, denied addressing the envelopes, and denied causing them to be placed in the mails for delivery.

In Petschel supra, the defendant admitted his intent to use the mails, and thus, giving rise to a logical inference that the use of the mails in delivery of the letter written by the defendant could be reasonably foreseen. However, even assuming that the handwriting expert procured by the Government is correct regarding the handwriting of the letter in question, the mere writing of a note on brown paper, hardly is sufficient to give rise to a reasonable inference that the writer ever intended such a note to be placed in the mails for delivery.

Furthermore, it was the petitioner's direct testimony that he did not write the notes, nor had he ever seen them.

18 U.S.C. 876, as amended August 12, 1970, makes it a crime to deposit in any post office or authorized depository for mail matter any threatening letter. However, that statute in no way refers to the mere writing of a note. The only evidence considered by the Court of Appeals in it's opinion refers to the handwriting analysis made by the Government witness. The Court had not before it even the scintilla of evidence linking the defendant to the mailing of the letters. In view of such limited testimony, it is beyond the stretch of imagination to say that the government has provided even "circumstantial evidence" to connect this defendant with the mailing of the letters.

The Court has also cited *Smith v. United States*, 343 F 2d 539 (5th Cir. 1965), but the facts, and the crimes charged are substantially different than those involved herein. Also in *Stevens v. United States*, 306 F 2d 834 (5th Cir. 1962), the

statutes under which the defendant Stevens was charged were different, and the circumstantial evidence showing use of the mails was more substantial.

In short, there is no reported case in which circumstantial evidence of the writing, was held to be sufficient to support an inference of intent to use the mails.

II

The Comments Made in Closing Argument by the Prosecutor at the Trial Below, Were So Prejudicial and Inflammatory as to Be Manifestly Unjust and to Have Deprived the Petitioner of a Trial by an Impartial Jury of His Peers.

In assessing the improper argument of the prosecutor, the Court of Appeals termed it a proper response upon the defense. However, the defense was not that "rich people don't commit crimes," but that the defendant's financial position made it unlikely that he would commit or attempt to commit the specific crime for which he was indicted.

To strengthen the effect of his improper statement, and in bald recognition of its impropriety, the prosecutor approached the jury and lowered his voice so that it was inaudible to defense counsel. This had the cumulative effect of denying the defense the opportunity of objecting, and reinforce in the jury's mind the truth of the statement.

Perhaps, had defense counsel been given an opportunity to object to the statement, had the objection been sustained and the jury properly cautioned the stain of the comment might have been lessened. However, as it happened, the jury went into deliberation without admonishment by the Court of the prosecutor for his conduct.

It is improper for a prosecutor to give his personal opinion, or to appeal to class prejudice, or to associate himself with the members of the jury by his comments.

And yet, although the prosecutor in this case violated all of these tenets and additionally deprived defense of an opportunity to object thereto, this Court in its original opinion denied defendant's appeal.

The "invited response" of the prosecutor in *United States v. Isaacs*, 493 F 2d 1124 (7th Cir. 1974), was a response to direct attack upon the character of the prosecutor made by the defense counsel. Likewise, in *United States v. Skelley*, 501 F 2d 447 (7th Cir. 1974), the "invited response" of the prosecutor was in no way connected with class prejudice, or in an attempt to associate directly with the jury.

The comments of the prosecutor here were an attempt to sway the jury by prejudice and inflammatory innuendo rather than the facts in evidence.

CONCLUSION

Certiorari is warranted here. Each of the elements which this Court has traditionally found to warrant the grant of Certiorari is present here:

A. The jurisdictional issue under a law of the United States, to wit: 18 U.S.C., Section 2314, is involved;

B. This Court has never denied the issue permitted in this case;

C. The holding of this Court of Appeals that circumstantial evidence which goes merely to the writing of the letter is sufficient to support a finding of mailing the letter, and is novel,

without precedence, either legislatively or judicial, and has such far reaching implications that the issue to be denied commonly and unequivocally have no less authority than this Court.

The errors of the Court below should not be permitted to stand.

Respectfully submitted

EDWARD G. MAAG
WALKER & WILLIAMS
Professional Corporation
4343 West Main Street
Belleville, Illinois 62223
(618) 277-1000
Counsel for Petitioner

APPENDIX

APPENDIX A

United States Court of Appeals for the Seventh Circuit
Chicago, Illinois 60604

April 2, 1976

(Argued December 12, 1975)

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. J. Sam Perry, Senior District Judge*

United States of America, Plaintiff-Appellee, No. 75-1617 vs. Ernest A. Fatheree, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois. No. 74-23-B Henry S. Wise, Judge.

ORDER

Defendant Ernest Fatheree was indicted on May 1, 1975, charged with violating 18 U.S.C. 876, which prohibits use of the mails to commit extortion. He was found guilty by a jury following a three day trial, and sentenced to five years in the custody of the Attorney General. The facts are these:

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* The Hon. J. Sam Perry, Senior District Judge, United States District Court for the Northern District of Illinois, is sitting by designation.

Mrs. A. W. Rosalind Pickel, a widow who recently lost her husband, received a series of envelopes through the United States mail bearing postmarks of Xenia, Illinois; Salem, Illinois; and Flora, Illinois. The envelopes contained crudely written messages written on brown paper requesting that she leave various amounts of money ($10,000-20,000) at designated locations in the community, or else she or her son would be killed. She contacted the authorities who arranged for the deposit of a package resembling the money at two separate drop-off sites, while the Federal Bureau of Investigation maintained surveillance of the sites. No effort was made to pick up the money.

The extortion notes were delivered to the F.B.I. who requested Mrs. Pickel to give the names of person who might have written the notes. Mrs. Pickel named the defendant as one person who may have written and mailed the notes. The F.B.I. took writing exemplars from the defendant and two other persons. At trial an F.B.I. handwriting analyst, Fred Woodcock, testified that the defendant's handwriting exemplar matched the handwritten notes received by Mrs. Pickel. He gave his opinion that there was very little doubt that Mr. Fatheree wrote the notes. His conclusion was based on his study of the handwriting style as well as the fact that in both the Fatheree handwriting exemplars and the extortion notes the word "leave" was spelled incorrectly as "leve".

In his defense the defendant presented five witnesses in an attempt to prove essentially two points: that someone else, specifically one Earline Hayes, had written the letters; and, that considering his character, reputation and personal wealth there was no reason or motive why he should attempt to extort money from Mrs. Pickel.

Our own experience indicates that this is a rather unusual criminal appeal. We have made a rather exhaustive review of the record which shows that the defendant, who is 61 years old,

has lived with his wife in the community most of his life. Apparently he accumulated wealth of approximately a quarter of a million dollars by working a full time job at a shoe factory in addition to maintaining a farm. He has never previously been convicted of a crime nor had any substantial difficulty with the law.

The defendant and his wife were social friends of Mrs. Pickel and her husband before his death. The defendant did however have a dispute with the Pickel's hired hand, Robert Humes, which may have chilled their relationship. Nevertheless the defendant cooperated fully with the F.B.I. and even sought out Mrs. Pickel to discuss why she had given his name to the authorities. At trial Fatheree took the stand and denied sending the extortion notes. No evidence was introduced to contradict the opinion of the government's expert that the extortion notes were written by the defendant, but an extensive cross-examination of Woodcock was undertaken. The defense argued to the jury the proposition that a man of Fatheree's considerable wealth would have no motive or need to extort money from Mrs. Pickel.

The government is not required to prove the defendant's motive in committing a crime. All that the government need present is evidence showing that the defendant knowingly and intentionally committed the act charged. It must prove this proposition beyond a reasonable doubt. Our reading of the record indicates that despite a very skillful and experienced presentation by defense counsel the jury was convinced of the defendant's guilt. We believe their verdict is supported by sufficient evidence. Despite a very vigorous cross-examination by defense counsel the key testimony regarding defendant's handwriting remains unrebutted and is sufficient to convict the defendant.

Clearly the jury was properly instructed and convinced of the defendant's guilt beyond a reasonable doubt. On appeal

we must review the evidence in the light most favorable to the prosecution. *Glasser v. United States*, 315 U.S. 60 (1942).

The defendant has also raised the arguments that the trial court erred in denying his motion for acquittal and for a mistrial. He asserts that there is no real evidence linking himself with the posting and delivering of the letters. But in *Petschel v. United States*, 369 F.2d 769 (8th Cir. 1966), the Court, in reviewing a conviction also under 18 U.S.C. 876, stated that: "It is well established that proof of mailing and causing mailing may be made by circumstantial evidence". Also see *Smith v. United States*, 343 F.2d 539 (5th Cir. 1965), *cert. denied* 382 U.S. 861 (1965), and *Stevens v. United States*, 306 F.2d 834 (5th Cir. 1962). See also *Marvin v. United States*, 279 F. 2d 451 (10th Cir. 1960).

In a recent case, *United States v. Ring*, 513 F.2d 1001 (6th Cir. 1975), the evidence was receipt of the letters by the victims and the existence of the appellant's fingerprints on the notes and envelopes. The Court, at p. 1010, noted that: "the only reasonable inference to be drawn was that Ring caused, or was directly associated with the mailing of the threatening letters".

The fact that the letters were received in the mail, bore post office cancelled United States postage stamps on the envelopes, and that the appellant's writing was found on the envelopes and letters, is sufficient evidence for the jury to infer that "the only reasonable inference to be drawn was that . . . [the appellant] caused or was directly associated with the mailing of the threatening letters". *United States v. Ring, supra.*

Thus, the Court was correct in denying defendant's motion for acquittal based on insufficient evidence of mailing.

We believe the trial court also was correct in denying the motion for a mistrial which was made after the prosecutor's

final argument. The prosecution stated at the end of the argument that:

> "Mr. Fatheree had some money. Mr. Maag tells you there is no motive. Don't confuse motive with intent, ladies and gentlemen. They are not the same. You know what the cold hard facts of that are, that rich people don't commit crimes. It is only people like you and I that aren't rich that do. That is the cold hard facts."

As a rule we do not approve of a prosecutor giving his personal opinion in closing argument, nor do we approve of appeals to class prejudices. However, this particular comment, considered in light of the defense presented is not so prejudicial or inflammatory so as to require the granting of a mistrial or a reversal on appeal.

The government simply commented upon the defense. Intent and motive are often easily confused. The government cautioned the jury against confusing the issues. Comments made in response to a defense have been consistently upheld by the courts. *United States v. Skelley*, 501 F.2d 447 (7th Cir. 1974), *cert. denied* 419 U.S. 1051 (1974); *United States v. Greer*, 467 F. 2d 1064 (7th Cir. 1972); *United States v. Isaacs*, 493 F.2d 1124 (7th Cir. 1974), *cert. denied* 417 U.S. 976 (1974), *reh. denied* 418 U.S. 955 (1974).

The fact that the prosecutor made such an argument is understandable in light of his attempt to make a forceful and vigorous argument based on the evidence. We do not believe it had any erroneous impact on the jury's determination.

Affirmed.

Unpublished Per Curiam Order

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 12, 1976

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. J. Sam Perry, Senior District Judge*

United States of America, Plaintiff-Appellee, No. 75-1617 vs. Ernest A. Fatheree, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois No. 74 23 B Henry S. Wise, Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Illinois, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the order of this Court entered this date.

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* The Honorable J. Sam Perry, Senior District Judge, United States District Court for the Northern District of Illinois, is sitting by designation.

APPENDIX B

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

April 20, 1976

Before

Hon. Walter J. Cummings, Circuit Judge

Hon. William J. Bauer, Circuit Judge

Hon. Joseph Sam Perry, Sr. District Judge*

United States of America, Plaintiff-Appellee, No. 75-1617 vs. Ernest A. Fatheree, Defendant-Appellant.	Appeal from the United States District Court for the Eastern District of Illinois, Benton Division. (Cr. 74 23 B)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be, and the same is hereby, Denied.

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* The Honorable Joseph Sam Perry, Senior District Judge, United States District Court for the Northern District of Illinois, sitting by designation.

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ERNEST A. FATHEREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

RICHARD L. THORNBURGH,
Assistant Attorney General,

MICHAEL W. FARRELL,
FREDERICK EISENBUD,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

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ERNEST A. FATHEREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1976, and a petition for rehearing was denied on April 20, 1976. The petition for a writ of certiorari was filed on May 20, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for mailing extortionate letters or causing them to be mailed.

2. Whether the prosecutor's remarks during rebuttal argument denied petitioner a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Illinois, petitioner was convicted on three counts of mailing or causing to be mailed letters containing threats to injure the addressee or another, in violation of 18 U.S.C. 876, and was sentenced to concurrent terms of five years' imprisonment. The court of appeals affirmed (Pet. App. A-1 to A-5).

The evidence showed that in December 1973 and January 1974, Mrs. A. W. Pickel received through the mails four unsigned, handwritten letters which threatened her life and that of her son if she did not leave large amounts of money ($10,000-$20,000) at designated locations (Tr. 17-23, 100).[1] All the envelopes bore cancelled United States postage stamps postmarked at various post offices in Illinois (Tr. 27-28, 134-135; Pet. App. A-4).

An FBI handwriting analysis expert testified that, based upon comparison of the handwriting on these letters and a handwriting exemplar obtained from petitioner, the addresses on the four envelopes and the entire first letter were written by petitioner, and that there was little doubt that petitioner had also written the other three letters (Tr. 209-210, 293; Pet. App. A-2). Petitioner offered no expert testimony to refute this evidence, although his counsel cross-examined the expert vigorously and at length (Tr. 248-293; Pet. App. A-3).

Petitioner presented three witnesses in support of his defense that someone else, particularly Earline Hayes, had written the letters (Tr. 312-354). Petitioner denied writing the letters or trying to extort money from Mrs. Pickel (Tr. 424, 425). Petitioner and his wife

[1]The FBI arranged for the deposit of a package at the designated drop-off site, but no attempt was made to pick it up (Tr. 47-49).

also testified that they were reasonably affluent and had a friendly relationship with the Pickels; petitioner indicated, however, that he had had a dispute with the Pickel's hired hand (Tr. 376-387, 409-420).

ARGUMENT

1. Petitioner contends (Pet. 6-8) that the evidence was insufficient to establish that he mailed the Pickel extortion letters or caused them to be mailed. However, viewed in the light most favorable to the government, *Glasser* v. *United States,* 315 U.S. 60, 80, the evidence was sufficient.

As the court of appeals correctly noted (Pet. App. A-4), proof of mailing or causing a mailing may be shown by circumstantial evidence. *E.g., United States* v. *Ring,* 513 F. 2d 1001, 1010 (C.A. 6); *Petschl* v. *United States,* 369 F. 2d 769, 772 (C.A. 8); *Smith* v. *United States,* 343 F. 2d 539, 543-544 (C.A. 5), certiorari denied, 382 U.S. 861. These four extortion letters were received in the mail and bore cancelled United States postage stamps. The uncontradicted expert handwriting testimony established that petitioner had written at least one and probably all of the letters and had addressed all their envelopes. Under these circumstances, the court of appeals correctly concluded (Pet. App. A-3, A-4) that the evidence was sufficient "for the jury to infer that 'the only reasonable inference to be drawn was that * * * [petitioner] caused or was directly associated with the mailing of the threatening letters.' "

2. Petitioner also contends (Pet. 8-9) that a statement made by the prosecutor in rebuttal argument denied him a fair trial.

In closing argument, petitioner's counsel repeated a defense first raised in his opening argument, that petitioner had no motive for attempting to extort money

from Mrs. Pickel, a social acquaintance, because of his wealth (Tr. 477-478). In rebuttal, the prosecutor stated (Tr. 488):

> Mr. Fatheree had some money. [His counsel] tells you there is no motive. Don't confuse motive with intent, ladies and gentlemen. They are not the same. You know what the cold hard facts of that are, that rich people don't commit crimes. It is only people like you and I that aren't rich that do. That is the cold hard facts.

Petitioner's counsel did not object to this statement until after the jury had retired to deliberate (Tr. 499-505).[2]

The prosecutor's remark was not improper. As the court of appeals correctly held (Pet. App. A-5), "[t]he government simply commented upon the defense. * * * The government cautioned the jury against confusing the issues [of motive and intent]. Comments made in response to a defense have been consistently upheld by the courts." In any event, the court properly held (*ibid.*) that the statement was "not so prejudicial or inflammatory so as to require the granting of a mistrial or a reversal on appeal." See *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 237-240; *United States* v. *Bowen*, 500 F. 2d 41 (C.A. 6), certiorari denied, 419 U.S. 1003.

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[2]The record does not support petitioner's contention (Pet. 8-9) that counsel's failure to make an immediate objection was excusable because the prosecutor delivered the remark in a low voice as he approached the jury. The trial judge found that the prosecutor made this remark at the podium (Tr. 505).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

MICHAEL W. FARRELL,
FREDERICK EISENBUD,
Attorneys.

JULY 1976.